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What Manufacturers Should Know About the New Robinson-Patman Act

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WHAT

MANUFACTURERS Should Know About the New Robinson-Patman Act!

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An Important Aspect of the Robinson-Patman Act

The Robinson-Patman Act as finally passed carries two important viewpoints on prices.

The first of these two viewpoints is made a part of the Clayton Act by replacing Section 2 of that Act with a new Section which is Section 1 of the Robinson-Patman Act. This part of the Robinson-Patman Act, therefore falls under the administration of the Federal Trade Commission.

What Is Behind This First Viewpoint

This viewpoint is that price is made up of two factors, namely: first, the price at which the supplier can produce the product in the usual course of business and as a result of *all* the orders he receives in a normal way, regardless of their size; and, second, the variations in price at which the producer can fill certain orders because of *different* conditions in manufacture, sale or delivery specifically connected with them.

This viewpoint holds that all purchasers are entitled to the price resulting from the volume of business obtained and filled without there being involved any method different from the run-of-the-business, day-to-day practices of the seller, even if some of the run-of-the-mill orders do not happen to use all of the facilities regularly maintained by him. (Whether or not this construction will stand the test of the Courts remains, of course, to be seen, but it is nevertheless the construction advanced in connection with the enactment of the law).

The Other Side of the Question

On the other hand, this viewpoint holds that the customer who perfects and uses methods of delivery or purchase which are *different* from the run-of-the-business, day-to-day practices of the seller, can be given a price differential covering the resultant saving to the seller, and as well any economies in production which he also secures as a result.

This viewpoint is advanced by those favoring the law in the belief

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that, under it, the fact that the use of the possession of the mere size or financial strength necessary to place a very large order is regulated, is offset against the right to secure full rewards for different and more economical methods of purchase and delivery. In other words, that although a million-dollar order placed in the usual way is merely entitled under the Act to any lower price at which *all* sales of the exact item can be made and handled with it included, on the other hand if methods of sale or delivery, *different* from those under which the run-of-the-business is conducted or obtained, are involved in the million dollar sale, then full allowance may be made for the resulting savings in sales, delivery or production costs.

The Question of Point-of-Sales Allowances

This first viewpoint also holds that if, in addition to the purchase of goods, the manufacturer desires to buy point-of-sales or other sales promotion services *from the customer,* supply the customer with sales promotion facilities, or, in other ways makes arrangements with the seller which mean savings, added sales or direct income *to the customer at the seller's expense,* that, then, such arrangements must be made on a proportionately equal basis with all the competitors of the customer. It is held by those advancing this viewpoint, that the seller can fix requirements in respect to equipment, ability, sales-volume, customer-flow and the like, flexible enough to make the "proportionately equal" requirement not unduly burdensome. Nevertheless, the heart of this viewpoint is that the customer makes the efforts to sell more goods which are involved as a service for, and at the expense of, the supplier, *and not in his own interest in order to sell the goods he has taken into stock from the supplier,* and that, therefore, these transactions must be regulated in order to prevent false use of them as price concessions.

The Second Viewpoint

The second viewpoint, that contained in Section 3, is probably a great deal more logical to most merchants than the first. It is simply that the allowances, discounts, rebates and advertising service charges accompanying quantity orders are obtained by the customer, and willingly given to him by supplier, so that he can, *for his own benefit in order to move the large order he has placed,* both use special efforts — no doubt perhaps the very efforts the special payments or allowances would call for under

the first viewpoint — to move the goods purchased, and as well be able to pass on to consumers savings which the large order brought to the supplier.

How the Act Handles the Question of Point-of-Sales Allowances

In other words, Section 3 simply provides that all allowances, rebates, discounts and advertising service charges given on account of a quantity order must be made available to all competitors willing and able to place an order for that quantity. Naturally, if a supplier and a seller decide that a price for a quantity is subject to a certain upset, total discount, and the supplier is willing to take all orders tendered him for a similar quantity by competing purchasers able to discharge the responsibility, Section 1 and the Federal Trade Commission and the first viewpoint mentioned above, are not at all involved, unless at some time or other the Federal Trade Commission has been sustained in holding there are so few purchasers available of such quantities of the commodity or classes of commodities involved as to create a situation promotive of monopoly or unjustly discriminatory. And this is the case, even if *the customer* in the natural course of moving the goods involved utilizes every method, facility or service which might be guaranteed to the seller by an arrangement made under Section 1 (the new Section 2 of the Clayton Act) according to the first viewpoint — for he would be using them for his own benefit first, and only indirectly to the benefit of the supplier, in a natural way in the course of good, sound merchandising.

What Section 3 Is!

Section 3, moreover, is a new Federal statute — it does not amend the Clayton Act, and has nothing to do with the Federal Trade Commission. Of course the Federal Trade Commission can allege under law existing before the enactment of the Robinson-Patman Act, that prices made under this second viewpoint constitute unfair trade practice, substantially lessen competition in a line of commerce or tend to create monopoly, but that is a right it has held for years, and so long as no monopolistic or unusual competitive conditions are actually involved in a quantity price made under Section 3, and particularly if its price reflects actual savings and advantages to the supplier, there is no reason for not transacting business under Section 3 and foregoing entirely making ar-

rangements coming under Section 1 for supplying facilities or services to suppliers, except in instances where manufacturers make them as a matter of course as a percentage of *all purchases* from them.

Complete Data on the Act

These two distinct viewpoints toward quantity purchases are typical of a number of important aspects of the Robinson-Patman Act. Some of them are suggested in the questions and answers which are printed in two separate questionnaire booklets of particular interest to manufacturers and national distributors; others are suggested in a third separate booklet, bring together, *for the first time,* the various construction of the Act's wording. There has been made available in separate leaflets, for greater convenience in individual use, a complete text of the Clayton Act, as amended by the Robinson-Patman Act (with the old wording of Section 2 appended); of the Federal Trade Commission Act; and of the Robinson-Patman Act itself.

The text hereof has been referred to counsel, but of course, nevertheless, the gradual adjudication to which the provisions of the Act will be subject may well establish entirely different constructions. Dr. Nathan Isaacs, Professor of Business Law, the Harvard Graduate School of Business Administration, has very kindly read the opinionative portions of the text, although he is in no way, as a result, responsible for its viewpoints or constructions. He has also prepared a very useful and suggestive memorandum in connection with the Act which is printed herewith in full.

Since the Institute of Distribution has built up what are probably the most complete files existing on the Robinson-Patman Act, its staff will gladly answer, to the extent of the facilities available to them, enquiries about the Act addressed to the Institute offices, 570 Seventh Avenue, New York City.

Wheeler Sammons

Managing Director,
INSTITUTE OF DISTRIBUTION, INC.

What Manufacturers Should Know About the New Robinson-Patman Act

Manufacturers are perhaps the most vitally interested of all business groups in the Robinson-Patman Act. As amended before passage, this legislation *is entirely different* from the original Robinson and Patman Bills. It is important that manufacturers understand this fact, and as well exactly what the new law does involve, both apparently quite obviously, and as well subject to differences of opinion which only adjudication can settle finally. An effort to analyze the new law under those two headings follows:

I.

WHAT THE NEW LAW OBVIOUSLY ENACTS

A: CAN MANUFACTURERS STILL GIVE QUANTITY DISCOUNTS?

Yes. Section 3 of the law as a matter of fact specifically provides for quantity discounts, merely requiring they must be available to all competitors buying in like quantities. Section 1 (the new Section 2 of the Clayton Act) also provides for quantity discounts, but prescribes that they be justified by differences in the cost of selling, delivery or production subject to the power of the Federal Trade Commission to fix and establish quantity limits *in the case* of a commodity or class of commodities in connection with which it has held — and been sustained in so holding — after formal hearings, that the available purchasers in the quantities in question are so few as to result in the discount being "unjustly discriminatory" or promotive of monopoly in any line of commerce.

B: WHAT IS THE GUIDING PRINCIPLE IN RESPECT TO QUANTITY DISCOUNTS?

Apparently the guiding principle in respect to quantity discounts in Section 1 can be assumed to be whether or not a discount is given *at the expense* of others than the recipient (who are competitors of the recipient) — in other words, the factor of judgment is evidently whether or not as a result of the discount others who are competitors are *forced to*

bear unfair expense in the prices given them. In Section 3 it seems to be reasonable classification of customers on the basis of the quantity purchased and the treatment of all in one quantity-group alike.

C: MUST THE MANUFACTURER PROTECT THE LARGE BUYER AS WELL AS THE SMALL IN RESPECT TO PRICES?

Absolutely — in order to protect himself from possible liability. The new law attempts to regulate the use of resources and size to crush out competition unfairly, but in return for doing so, it undertakes to *assure* the efficient distributor, perfecting and using different methods, a just reward for his efficiency and methods. If the manufacturer, through not giving the large distributor in comparison with his competitors — large or small — the prices he actually deserves — by forcing him to carry part of the cost of handling small orders, for example — the manufacturer now becomes subject to legal penalties, if the result is competitive injury to an outlet belonging to that distributor. A standing order filled periodically at the same price on the same size lots as a series of scattered competitors' orders by a manufacturer with a 20% overhead item for a national sales force, for instance, obviously now places that manufacturer under very serious possible liability indeed. Or a manufacturer delivering his nationally advertised product generally to retailers direct at the same price he continually delivers it in lots to the warehouse of a national distributor competitor might find himself liable for heavy penalties.

This construction of the law is the statement of the chairman of the sub-committee in charge of it in the House, *after all amendments had been made.* It varies from the construction made by the author of the *original bill,* the proponents of *the original bill,* and the House and Senate Committee Reports *on the original bill* — it relates to the *law passed.* The point is that the competition of the big buyer may be injured by withholding from him the savings due to his methods of buying, and if this is done he is discriminated against unlawfully.

This final construction means that manufacturers *must,* if they are to avoid possibly running afoul of the law, give competitors — large or small — the benefits of savings their methods of purchasing involve when doing otherwise will cause competitive injury to an outlet, whether belonging to a chain or not. In other words, while under Section 1 of the Act (Section 2 of the Clayton Act now), more or less arbitrary or rule-of-thumb discounts because of size, season or what-not are barred, and

although the over-all benefit of large orders are evidently to be shared among all purchasers in like quantities, on the other hand, the buyer who buys *in a different manner,* which results in savings, *must be* given that benefit if it can be shown the prices made to others discriminate therefore against him and cause competitive injury to an outlet of his. And all manufacturers dealing in nationally distributed articles know how difficult it would be to justify the prices usually given small-lot orders, in view of the extraordinary costs involved in handling them, as against the cost of handling very large orders involving radically different methods of sale and delivery — and perhaps of production. As a matter of fact, the manufacturers' problem, in the case of most goods nationally distributed through stores, probably *now becomes one of explaining why quantity or standing-order or warehouse-delivery orders are not given lower prices than has usually been the case in the past.*

D: MAY MANUFACTURERS BECOME LIABLE FOR SELLING SMALL QUANTITIES AT PRICES WHICH ACTUALLY FORCE PLACERS OF LARGE ORDERS TO BEAR INJURIOUSLY IN COMPETITION, UNFAIR PROPORTIONS OF COSTS?

Yes. At least, all manufacturers should be prepared *to show* that the known high costs of handling small-lot orders are not in part being paid by not allowing large orders from competitors of the small-lot purchasers sufficient discounts. For example, if cost analyses show that orders of dozen lots cost practically as much to handle as the invoices call for, as is certainly the case in some lines, and large orders by the car-load are not allowed a proper adjustment by way of a quantity discount, the large purchaser, if a competitor of a customer given the small-lot price, would have, if as a result injured competitively, a claim against the manufacturer for discrimination which only production of cost analyses in Courts could finally settle.

E: CAN MANUFACTURERS SELL TO WHOLESALERS OR JOBBERS OR BROKERS OR FACTORS AT A SPECIAL PRICE, OR TRADE DISCOUNT, JUST BECAUSE THEY SELL FOR RESALE?

By no means — the optional customer classification section was amended out of the law. As a matter of fact, if a manufacturer now

continues to give a wholesaler a trade discount, of say, 15% or 15% and 10% off of his wholesale list, on say a dozen lot, simply because wholesaling is involved, and does not adjust fully the price, in selling a large lot for delivery in bulk to a large retailer's local warehouse, until it fully covers the demonstrable cost differences, and a customer of the wholesaler happens to be in competition with the large-order retailer, one of whose outlets is competitively injured, the manufacturer faces liability under the law. Hereafter, prices to wholesalers *must be on the basis of quantities bought and methods of sales involved,* if the desire is to avoid possible liability under the law in cases where customers of wholesalers are in competition with retailers buying large quantities direct who are not serviced by the elaborate sales expenditures usually in such instances maintained by manufacturers regularly to cover the wholesale market. Wholesalers are not competitors of retailers, it is true— and Section 3 only prescribes that like prices for like quantities (of like grade and quality) be made available to *competitors. But* Sect. 1 (new Sect. 2 of the Clayton Act) reaches down to *customers* of grantors and recipients of price discriminations, and as well to *injury* competitively *with or to* those customers, thus going far beyond the "lessening competition" in a line of commerce or "tending to monopoly" scope of previous law. Therefore the Robinson-Patman Act covers an entirely different field than did the laws existing when the following descisions were made:

"The practice of allowing 'wholesalers' certain discounts on quantity purchases while denying similar discounts to 'retailers' (including corporations organized and owned by retailers to buy for and sell to their stockholders) who purchase the same quantity, does not indicate a purpose to create or maintain a monopoly, does not unduly hinder competition, and is not an unfair method of competition, nor is it an unlawful discrimination in price. [Mennen Company v. Commission (C.C.A. 2; 1923) 288 Fed. 774; certiorari denied, 262 U. S. 759. But see Geo. Van Camp & Sons Co. v. American Can Co., 278 U. S. 245]. Where a manufacturer of various toilet articles adopted a policy of allowing different discounts to wholesalers and to retailers, although purchasing similar quantities, and classed corporations organized to buy at wholesale and resell to their stockholders (who were retailers) as not being wholesalers and not entitled to wholesalers' discounts: Held that this indicated no intention to acquire a monopoly and was not a discrimination in price within the prohibition of the

section. [The Mennen Co. v. F. T. C., (C.C.A. 2; 1923) 288 Fed. 774, certiorari denied, 262 U. S. 759.]"

F: CAN THE FEDERAL TRADE COMMISSION FIX PRICES AS IT DESIRES?

No — the wide-open price-fixing grant to the Federal Trade Commission has been amended out of the law. Under Section 1 (the new Section 2 of the Clayton Act) the Commission can only prevent a price differential for quantity beyond a point *if* the purchasers involved are so few in number that it can be shown that differentials in their favor are either *promotive of monopoly in any line of commerce or unjustly discriminatory* — and any attempt of the Commission to act within this restricted field is subject to Court review — and, furthermore, the Courts must take into account that Section 3 of the new law specifically allows discounts on account of quantity. Also, it should be remembered the Commission *must first act* by taking upon itself to declare customers are so few as to cause the elements mentioned, to be, in its opinion, involved, *before* this provision becomes *in any way* applicable to any transaction. (The language of the Act assumes a logical connection between the smallness of the number of large purchasers and the injustice of a differential. This is a non-sequitur that is sure to cause trouble. It is not true "price fixing.")

G: ARE INTRA-STATE TRANSACTIONS INVOLVED?

No. The original bills tried to reach them, but the attempt was abandoned and amendments have eliminated the clauses involved. Of course, a sale to a buyer within the manufacturer's state, when it is known to the manufacturer that reshipment is to be made into other states, involves a delicate, legal question, but when the manufacturer is not definitely "on notice" as to reshipment or final disposition, even this extremely border-line question does not necessarily arise. (Note, however, that an intra-state transaction may be compared to an inter-state one to show discrimination).

H: MUST A PRICE DISCRIMINATION HAVE CERTAIN EFFECTS TO COME UNDER THE LAW?

Yes. Only those price discriminations come under the law which can be shown to substantially lessen competition in any line of com-

merce; or to tend to create a monopoly in any line of commerce; or to *injure,* destroy or prevent competition with whoever grants them or knowingly receives the benefits from them, or with their customers. Unless one of these results can be shown to have actually taken place, or presumed, (subject to being proved) under the rule laid down in Section 1(b) (the new Section 2(b) of the Clayton Act), the new law is not involved.

I: MAY MANUFACTURERS MAKE DIFFERENT PRICES IN DIFFERENT LOCALITIES?

Surely — except, of course, "for the purpose of destroying competition or eliminating a competitor" (Sect. 3). "Discrimination" must involve discrimination against someone. So at least two competitors must be involved. Stores in different markets are not in competition, as are not other concerns not reaching into each other's markets. (On the other hand, the original Section 2 was inspired by a desire to prevent *locality* discriminations in trust-building).

J: CAN MANUFACTURERS ALLOW DIFFERENTIALS FOR FREIGHT OR TRUCKING?

Yes. They can also sell at a national price — subject to the quantity and other price provisions of the law, of course (the provision prohibiting laid-down prices (the anti-basing point provision) was amended out of the law.) (A query, however: How can we be sure that a more expensive transportation and delivery to A at B's price is not against Section 1, paragraph (e)?)

K: CAN MANUFACTURERS REFUSE TO SELL CERTAIN CUSTOMERS?

Yes, so long as their selection of customers is made in bona fide transactions and not "in restraint of trade." In other words, the manufacturer has a right to deal with whom he pleases — unless he enjoys, or succeeds, in attaining such a highly improbable degree of dominance that selecting his customers results in restraining trade in the entire line of commerce he happens to be in — and the law specifically affirms this right. A manufacturer is therefore at perfect liberty to accept only orders of a certain size, if he wishes, or to only trade

with customers of a certain type, or only certain chosen customers. Some manufacturers may find it effective to set up separate corporations to serve customers of specific types only.

L: CAN MANUFACTURERS MAKE PRICES, REGARDLESS OF THE NEW LAW, TO MEET CHANGING MARKET CONDITIONS?

Yes. The prohibitions of law do not apply to price changes made from time to time because of changing conditions affecting the market for or the marketability of the goods concerned. This provision is very important in certain lines affected by rapidly changing conditions of marketability — as, for example, style clothing.

M: CAN MANUFACTURERS REDUCE PRICES TO MEET COMPETITION AND STILL BE WITHIN THE LAW?

Yes. A manufacturer is directly justified by the law in meeting specific legal competition.

N: MUST A MANUFACTURER MAKE THE SAME PRICE OR ALLOWANCE IN ALL TERRITORIES?

By no means. *Competitors* buying in the same quantities and in exactly the *same manner* are the parties to be considered in judging whether or not a price or allowance comes within the law. (See the sentence in parenthesis at the end of "I," above, as the same observation is of interest in connection with this answer).

Naturally, a manufacturer cannot, under Section 3 of the law, sell at unreasonably low prices, or at different prices in different sections, in order to run a competitor of his out of business or to destroy *his* competition, if it is demonstrable his prices are beyond reasonable doubt both in fact "unreasonable" and directly intended to *eliminate* a competitor or "destroy" competition. (Retailing is too obviously *an intra-state* activity to make it logical to consider it otherwise, and therefore subject to the price controls of the new law, unless and until the Supreme Court decides otherwise).

O: MUST A MANUFACTURER NOW WITHDRAW ALL ALLOWANCES OR PAYMENTS FOR ADVERTISING OR DISPLAY SERVICES; OR POINT OF SALES COOPERATION; OR OTHER SERVICES SUPPLIED BY CUSTOMERS?

By no means. In the first place, the law only applies to *competing customers* in its provisions respecting services, payments and allowances. Indeed, so long as services are actually rendered as specified in a contract having no reference to the purchase of goods or the carrying of stocks of the manufacturer's goods, it is very questionable indeed if this law can reach them. However, quite aside from this fundamental point, the manufacturer is entirely at liberty fairly to fix the factors — equipment, ability, customer-flow, or facilities — which he believes it necessary for a customer to possess or supply or meet in order satisfactorily to discharge the services for which he is contracting or allowing — the law simply prescribes that all able to meet these conditions, *if competitors,* shall be treated proportionately equal to their ability to meet them. Furthermore, it must be kept in mind that the provision, like several others provisions of the law, works *UP PROPORTIONATELY* from the *smallest* outlet receiving a payment or allowance, as well as *down,* proportionately from the *largest.* In other words, if a manufacturer were to find that services and allowances normally made in the course of business to the smallest outlet showed a fair value of say, $100, and that smallest outlet did a business of $5,000 a year, then a large outlet doing $1,000,000 a year and *competing* in the same trading area and injured competitively, could claim the manufacturer was discriminating against it unless given like allowances and services worth on the same basis $20,000. And if window and counter displays received from the small outlet showed a customer-flow of 6,000,000, then the larger outlet would be entitled to 300 times whatsay 20,000 a year to have been reached, and from the big outlet ever the competing small outlet had been paid.

Also, in Section 3 the manufacturer is specifically authorized to adjust rebates, discounts, allowances or advertising service charges to quantities, so long as he makes them *available to all competitors* on that basis. Any manufacturer can certainly re-schedule all payments, allowances or similar relationships with customers under such a quantity schedule without undue inconvenience. While the provisions in Section 3 are distinct from those in Section 1 (the new Sect. 2 of the

Clayton Act), they are equally the law of the land; and since they legalize rebates, allowances, discounts or advertising service charges according to the quantities bought, it is evident any court will consider that fact should the Federal Trade Commission actually attempt to read into Sect. 1 the limitations on quantity discounts which the author of the original Patman and Robinson Bills, and originally many of their sponsors and the Senate and House Committee Reports as well, attempted to attach to the wording in reference to "differing methods" still remaining in that Section.

Under Sect. 1 (the new Sect. 2 of the Clayton Act) payments for services and point-of-sales cooperation are viewed as a separate "sales" by the retailer to the manufacture. Under Sect. 3 the viewpoint is taken that if certain quantities are bought, the manufacturer may willingly give as a total amount "off" for quantity, certain discounts, rebates, allowances and advertising service charges — and that he is quite entitled so to do, so long as he makes the amounts "off" available to all buying like grades, qualities and quantities — and that the buyer of the large quantity will then willingly (and in self-protection) render all the services, and supply all the facilities — without any mention of them at all — which might otherwise have been made the subject of "deals" under Sect. 1 (the new Sect. 2 of the Clayton Act), quite naturally and in order to move the large quantity bought.

II.

SOME IMPORTANT POINTS IN THE LAW ON WHICH THE COURTS WILL DOUBTLESS HAVE TO PASS

A: WHAT IS AN "UNREASONABLY" LOW PRICE?

Section 3 prohibits sales at "unreasonably" low prices to run competitors out of business. Obviously, what is or what is not an "unreasonably" low price can finally only be decided by court decision. Moreover, the insertion of such an indefinite expression in a statute carrying a penal stipulation is subject to challenge. The "unjustly" in Section 1 is another indefinite expression which will no doubt be subjected to court construction.

B: HOW, IF AT ALL, CAN THE NEW LAW REACH INTRA-STATE BUSINESS?

Retailing is ordinarily an intra-state activity if any activity is. Therefore, until the Supreme Court decides it is an *interstate* activity, it is not logical to assume that the new law can reach the prices charged by a store to its customers unless connected, perhaps, with a price discrimination illegal under the law.

The competitive provisions at one time in the Patman Bill with the admitted purpose of attempting to control intra-state competition have been amended out of the law as passed, and it does not appear logical to consider that those which remain apply to purely intra-state operations. (See Question G in Section 1).

C: DO SECTION 1 AND SECTION 3 CONFLICT IN RESPECT TO QUANTITY DISCOUNTS, AND REBATES, ALLOWANCES, AND ADVERTISING SERVICE CHARGES?

They do if the construction of the "differing methods" wording in Section 1 is taken as proposed originally by sponsors of the Patman Bill and the Senate and House Committee Reports on the Robinson and Patman Bills. *But* the law *as passed* is different, besides containing Section 3. Furthermore, and apparently as a result of Section 3 becoming part of the final Bill, sponsors of the legislation now advance a far broader construction of the "differing methods" wording. As a matter of fact, it would appear the "differing methods" wording, in the light of Section 3 being also enacted by the Congress, possibly becomes a definite indication that differing methods *must be allowed to the purchasers responsible for them if manufacturers are to avoid discrimination favoring competitors of those purchasers' outlets and therefore injurious to those purchasers.* In other words, until the Supreme Court rules otherwise, the law as passed, very clearly becomes a means by which the benefits of the most effective differences *in sales or delivery methods,* as well as resulting savings in production methods, may perhaps be legally *forced* to become available to consumers in many situations.

D: DOES THE LAW PROHIBIT A SELLER FROM PAYING A DISTRIBUTOR FOR BONA-FIDE SERVICES RENDERED THAT ARE THE EQUIVALENT OF WHAT IS KNOWN AS "THE BROKERAGE FUNCTION"?

The original wording of the Patman Bill in respect to "brokerage"

was amended by the interjection of "except for services rendered." It was generally assumed that this meant what it says — namely, that services actually rendered in connection with sales or purchases could be paid for, regardless of whether or not a broker happened to render them. However, the Conference Report says it does not, and that such services as a broker renders, a seller can only pay-for if rendered by a broker! A ranking member of the House Judiciary Committee on the Conference Committee did not sign the Committee's report, and he has read into the Record his disagreement with the novel construction of this wording. Naturally, the Courts will have to decide whether, by law, the functions considered as brokerage can actually be set-off as the special and sole prerequisites of brokers, and, if so, whether, in fact, this law covers the point.

E: IS THE GRANT OF POWER TO THE FEDERAL TRADE COMMISSION AN UNCONSTITUTIONAL DELEGATION?

Assuredly the Supreme Court will be called to pass upon this question if the Federal Trade Commission ever decides actually to "find" there are so few available purchasers of a commodity or class of commodities, that it should fix prices in order to forestall conditions unjustly — whatever "unjustly" may mean — discriminatory or promotive of monopoly. The absolutely unrestricted grant of price-fixing power contained in the Patman Bill at one time was amended out of it, and it will now remain to be seen if the Supreme Court will sustain this somewhat restricted grant. However, the question probably cannot be passed upon *unless and until* the Federal Trade Commission undertakes, after "due investigation and hearing to all interested parties," to declare that the specified grounds exist in respect to a specific commodity or class of commodities and then moves actually to fix "quantity limits" for that commodity or class of commodities.

F: ARE MANUFACTURERS SUBJECT TO PRESUMPTIVE MEASURES OF DAMAGE UNDER THE NEW LAW?

No — the presumptive measures for arbitrarily measuring damages under the law, which were in the Patman Bill at one time, were amended out of it before enactment.

G: ARE REPORTS, REGISTRATION, ETC. CALLED FOR?

No. The law itself contains no provision calling for reports or registration, or fixing similar obligations.

H: CAN MANUFACTURERS AND CUSTOMERS BE LEGALLY PREVENTED FROM CONTRACTING AT ALL FOR SERVICES, ETC?

Certainly it is to be questioned if the brokerage (especially if construed narrowly as mentioned in D above), advertising and allowance subsections of Section 1 (c, d and e) do not infringe the "due process" amendment of the Constitution. Capable counsel held this opinion when the wording of these subsections were first proposed.

I: CAN SECTION 3 BAN DISCRIMINATIONS WITHOUT SPECIFYING MOTIVES?

It is undoubtedly questionable if the first clause of Section 3 does not conflict with the decision of the Supreme Court in at least one case because it fails to specify any motive whatsoever.

J: DOES THE WORD "KNOWINGLY" IN SECTION 1 (a) ACTUALLY MAKE GUILT OF A SELLER DEPENDENT ON KNOWLEDGE BY THE BUYER — A MOST CURIOUS REQUIREMENT, THE EXISTENCE OF WHICH IS MOST IMPORTANT TO MANUFACTURERS?

Apparently. (Dr. Nathan Isaacs, Professor of Business Law, Harvard Graduate School of Business Administration, made the following observation in calling attention to this point during correspondence about the Act):

> "One point, however, strikes me as most peculiar. It is the use of the word 'knowingly' in Sect. 1 (a). I can understand its purpose and place in Section 3, the criminal part of the Act, and also in Section 1 (e). In Sect. 1 (a), it nullifies the new element that is supposed to be put on a par with the old ideas of hindering competition or tending to create a monopoly. What the statute says, in effect is that there is nothing unlawful about the discrimination described, so long as the party receiving its benefit is without guilty knowledge (unless of course we have the old competition and monopolization aspects). It is quite curious that the guilt of the seller should be dependent upon the knowledge of the buyer."

Note

The provisions of the Robinson-Patman Law go into effect at once without awaiting any action or ruling on the part of the Federal Trade Commission excepting as to one point: the fixing of a ceiling for quantity discounts. Unless or until it acts, quantity discounts are in order without any limit, provided all customers in any given quantity-bracket are treated alike.

The function of the Federal Trade Commission as one enforcement body, but by no means the only one, is precisely as it always has been for the rest of the Clayton Act and other anti-trust laws. It may institute complaints of its own initiative in cases of unfair methods of competition, provided they be of public interest, and it may issue "cease" and "desist" orders in such cases. These can be enforced only by resort to court, and its action is thus always subject to judicial supervision. Its findings of fact, however, stand if supported by testimony. It is apparently assumed, when the new Act talks about procedure in or before the Commission, that discrimination may constitute technically an unfair method of competition, as defined by the Federal Trade Commission Act. It is not necessarily so.

The manufacturer, therefore, cannot afford to wait until the Federal Trade Commission acts. He must decide, at his own peril, just how certain new concepts in the Act affect him.

These new concepts make it possible for a larger buyer to establish injury from discriminations between him and small buyers, just as decisively as they make it possible for small buyers to establish discriminations injurious to them. The possibilities which arise in connection with the actual cost variations resulting from filling or handling or producing orders in different ways, or received in different quantities make these new concepts of great importance to all manufacturers who may, because of not understanding they have been written into the Act, not realize that now the cost of handling a *small order of a "twelfth of a dozen assorted,"* in comparison with the cost of filling a *large standing order, periodically, direct to a warehouse in large lots,* is as important in connection with establishing whether or not the differentials represented in the prices charged in each instance injure the large buyer, as it is in connection with possible injury to small lot buyers, whether they be wholesalers, jobbers, peanut stands, corner groceries or small general retail outlets, *if they are in competition with outlets of the large buyer.*

This fact merits the very thoughtful — even prayerful — study of any manufacturer assuming the law provides a safe basis for withdrawing actually, for the sake primarily of the business advantage involved — long-established practices in connection with quantity orders, under the plea *"regulations from the Federal Trade Commission must be awaited"* or the belief that the Robinson-Patman Act practically so instructs.

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Although shortness of funds ($500,000 less than previous fiscal year, with two new additonal investigations besides the administration of the Robinson-Patman Act to handle) will affect administration of Section 1 of the Robinson-Patman Act by the Federal Trade Commission it, of course, *will not prevent* administration as part of the regular business of the Commission. This is the type of administration which will probably occur, instead of a separate division being set up, which probably would have been done had the Congress appropriated any money for the administration of the Section. One of Commissioners might be designated to especially supervise administration of the Section.

If administered as above suggested, complaints under the Section will be referred, as in the case of the Commission's regular business, to the Chief Examiner. After study, and hearings in the case of those put to hearing, decisions are announced, and orders issued under those calling for orders — all of which then become subject to Court test.

The Commission may issue regulations for guiding its Administration of the Section and those involved, but these will be merely rules of procedure — as mentioned elsewhere, the Commission may interpret the Section in the course of its decisions, or even by statements of its opinion, but such interpretations would be subject to Court review, for the Section gives the Commission no power to issue regulatory or other interpretations which have any effect themselves as law. The personnel, etc., of the Commission is listed and its regular methods of procedure summarized in the pages that follow.

What You Should Know About the Federal Trade Commission!

The Commission's address is 2001 Constitution Avenue, Washington, D. C. (Telephone NAtional 8206) — there are branch offices in New York (45 Broadway, telephone DIgby 4–7730), Chicago, San Francisco and Seattle. The chairmanship rotates annually according to seniority that is to say, Garland S. Ferguson, Jr., will be chairman next year, replacing the present incumbent, Charles H. March. The total term of office of a Commissioner is 7 years; salary, $10,000.

[The three Democratic Commissioners are indicated below — the remaining two are Republicans — and the year of appointment. The addresses below in parentheses are the residence addresses in Washington, D. C., unless otherwise indicated].

THE COMMISSIONERS

CHARLES HOYT MARCH, *Chairman,* 1929, [Shoreham Hotel]. Born 1870, [Litchfield, Minnesota] [population (1930) 3,000], where, after high school education followed by admission to bar in 1893, began practice law [March Bros.], and became attorney for Great Northern Railway. One-time mayor and president Library Board of Litchfield; president Farmers and Bankers Council of Minnesota; and vice-chairman of Safety Comm. of Minnesota. Colonel 4th Regt. Minn. Militia, which organized; member Special Industrial Recovery Board. Republican campaign manager for Minnesota for Coolidge, and chairman Minnesota delegation to Republican National Convention for many years. Mason. Home, Litchfield, Minn.

GARLAND SEVIER FERGUSON, JR. [Democrat] [1934-second term; first term, 1927-34] [The Dresden]. Born 1878, [Waynesville, N. C.] [population (1930) 2,000]. One year [1895-6] at U. S. Naval Academy; three at University of North Carolina, and admitted to North Carolina bar, and into practice with father at Waynesville, and later in practice at Greensboro, N. C., until appointed to Federal Trade Commission in 1927, intervening years being attorney for Southern Railway (1903-18) and asst. gen. counsel for Newport News Shipbuilding and Dry Dock (at Washington, D. C., 1921-7). Mason, Elk. Home, Greensboro, N. C.

Ewin Lamar Davis [Democrat] [1933] [100 Maryland Avenue, N.E.] Born Bedford County, Tenn., 1876. Studied law (Vanderbilt and George Washington Universities) 1895-9 (LL.B.), and then entered practice [Tullahoma, Tenn., population (1930) 3,000]. Later Democratic presidential elector (1904); Circuit Court Judge (7th. circuit of Tenn.) (1910-18); and member of Congress (5th Tenn. Dist., 66th to 72nd Congress). Member American and Tenn. Bar Associations; dir. Traders National Bank, Tullahoma. Trustee Tenn. Coll. for Women. Mason; K. of P. Home, Tullahoma, Tenn.

William Augustus Ayres [Democrat] [1934] [Wardman Park Hotel] Born [Elizabethtown, Ill.] 1867. Three years after education at Friends' University, Wichita, Kansas, (1880-90) admitted to Kansas bar and has since practiced [Ayres, Cowan, McCorkle (Director of the Trade Practice Conference Division of the Federal Trade Commission is a George McCorkle) and Fair.] at Wichita. [Population, (1930) 100,000]. Has been a Clerk of the Kansas Court of Appeals (1897-1901); a county prosecuting attorney (Sedgewick Co., Kansas) (1907-11); and Member of Congress for many years (8th Kansas District, 64th to 66th Congresses (1915-21) and 68th to 72nd Congresses (1923-33); 8th, Kansas District, 73rd Congress (1933-35). Mason, K. of P., Odd Fellows. Home, Wichita, Kansas.

Robert Elliot Freer. [1935] Born [Madisonville, Cincinnati, Ohio] June 30, 1896. Student Ohio State University, 1913-1914; LL.B., Cincinnati Law School, 1917; L.L.M., Washington, D. C. College of Law, 1929; A.B., George Washington University, 1931. Admitted Ohio bar, 1917; practiced Cincinnati, 1917-1925; attorney Bureau of Valuations Interstate Commerce Commission, 1925-33; attorney and research assistant to Federal Coordinator of Transportation, 1933-35; special counsel, U. S. Senate Committee on Interstate Commerce, 1st Session, 74th Congress; appointed member Federal Trade Commission August, 1935, to Sept., 1938; Professor of Law, Xavier College, Cincinnati, 1922-23; Washington College of Law since 1926; instructor Economics, American University Graduate School, 1933 and 1934; member American and Federal Bar Associations; Mason; Army and Navy Country and National Press Clubs. [Home, No. 1 Carvel Circle, Westmoreland Hills, Md.]

LEGAL

Chief Counsel: WILLIAM T. KELLEY, the Westchester.

Assistant Chief Counsels: MARTIN A. MORRISON, 1327 Gallatin Street; RICHARD P. WHITELEY, 2229 Bancroft Place.

Chief Examiner: JAMES A. HORTON, Tilden Gardens.

Assistant Chief Examiners: ISHMAEL BURTON, 1313 Lawrence Street, N.E.; JOSEPH E. SHEEHY, 1650 Harvard Street.

Chief Trial Examiner: WEB WOODFILL, 1901 Columbia Road.

Assistant Chief Trial Examiner: F. C. BAGGARLY, 2915 Connecticut Avenue.

Director, Trade Practice Conferences: GEORGE MCCORKLE, the Albermarle.

Assistant Director, Trade Practice Conferences: HENRY MILLER, 1630 Fuller Street.

Chairman, Special Board of Investigation: E. J. ADAMS, 4707 Connecticut Avenue.

Chief, Export Trade Section: ELLEN L. LOVE, 3748 McKinley Street.

ECONOMIC

Chief Economist: FRANCIS WALKER, 2848 McGill Terrace.

Assistant Chief Economists: W. H. S. STEVENS, 3900 Cathedral Avenue; WILLIAM H. ENGLAND, 1344 Iris Street.

Chief Accountant: LECLAIR HOOVER, 1700 T Street.

Chief Statistician: G. A. STEPHENS, 3518 Northampton Street.

ADMINISTRATIVE

Secretary: OTIS B. JOHNSON, the Westchester.

Assistant to the Chairman: JOE L. BAKER, 7200 Meadow Lane, Chevy Chase, Md.

Assistant Secretary: C. G. DUGANNE, 1801 Calvert Street.

Accounts and Personnel, chief: ANDREW N. ROSS, 1343 Sheridan Street.

Docket, chief: J. W. KARSNER, 5232 Seventh Street.

Librarian: HOWARD R. ELIASON, 1314 Columbia Road.

Mail and Files, chief: WILLIAM H. GALBRAITH, 3408 Tenth Street, N.E.

Publications, chief: HAROLD B. STAMM, 117 Aspen Street, Chevy Chase, Md.

Stenographic, chief: JOSEPH E. HAUGH, 60 Shepard Street, Hyattsville, Md.

Supplies, chief: SAM F. SHROUT, 125 Bolivar Street, Clarendon, Va.

PROCEDURE, Etc.

The Federal Trade Commission was created by an act of Congress approved September 26, 1914, in which the Commission's powers and duties were defined. The Commission is an independent agency, with its five members appointed for a term of seven years each by the President of the United States with the approval of the Senate. No more than three members may be of one political party.

Further powers are conferred upon this commission by "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), by "An act to promote export trade, and for other purposes," approved April 10, 1918, known as the export trade act (Webb-Pomerene law), and by the Robinson-Patman Act (amending in Sect. 1, Sect. 2 of the Clayton Act), approved June 20, 1936.

DUTIES OF THE COMMISSION UNDER THE CLAYTON ANTI-TRUST ACT

The Commission is given jurisdiction over violation of sections 2, 3, 7 and 8 of the Clayton Act, which prohibit:

(1) Certain discriminations in prices between different purchasers of commodities where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or *knowingly* receives the benefit of such discrimination or with customers of either of them.

(2) In certain cases, so-called tying contracts, or contracts whereby, as a condition of sale or lease, the seller or lessor exacts from the purchaser or lessee an agreement that he shall not use or deal in the goods or other commmodities of a competitor of the lessor or seller, where the effect of such agreement may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

(3) Acquisition by one corporation of the share capital of another corporation engaged in commerce, or acquisition by one corporation of the share capital of two or more corporations engaged in commerce, where the effect, in either case, may be to substantially lessen competition between the acquiring and acquired companies, or to restrain commerce or tend to create a monopoly.

(4) So-called interlocking directorates in cases where one person shall at the same time be a director in any two or more corporations (any one of which has capital surplus, and undivided profits aggregating more than $1,000,000) engaged in interstate or foreign commerce, other than banks, banking associations, trust companies, and common carriers subject to the act to regulate commerce, if such corporations are or have been competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws.

Procedure under the Clayton Act is, with some exceptions, identical with that under the Federal Trade Commission Act, for which see below.

FUNCTIONS AND PROCEDURE UNDER THE FEDERAL TRADE COMMISSION ACT

Section 5 of the Federal Trade Commission Act declares that "unfair methods of competition in commerce are hereby declared unlawful" and empowers and directs the Commission to prevent "persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce."

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. Provision is made for hearings and the taking of testimony. If the Commission shall then be of the opinion that the method of competition in question is prohibited by this act, it shall issue and cause to be served upon the person or organization against whom complaint is made an order to cease and desist from such unfair method of competition.

Provision is made for appeal to the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the Commission. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in the Judicial Code.

A letter to the Commission stating what the writer believes to constitute the employment of unfair practices by some concern is sufficient to

institute a proceeding under section 5 before the Commission. If the letter clearly discloses that nothing is charged within the jurisdiction of the Commission, it is filed without further action. If it appears, however, that there may have been such a violation of law, the matter is settled, after further investigation, by stipulation and agreement with the concern named in the letter, or by the issuance of a formal complaint followed by a formal trial of the charges, as required by the facts of the particular case and by the public interest, or by dismissal of the charges.

Stipulations setting forth the unfair practices used by the concern named and agreements to discontinue their use voluntarily are entered into where the public interest does not require formal action. Stipulations and agreements are not entered into in those cases where a fraudulent business is concerned, where the conduct of a legitimate business in a fraudulent manner is concerned, where the circumstances are such that there is reason to believe that an agreement entered into with the concern involved will not be kept, or where for any reason it is believed that the public interest will be better served by the institution of a formal complaint and proceeding. Digests of such stipulations and agreements are published.

A formal proceeding, instituted by a formal complaint and followed by the taking of testimony, filing of briefs, and oral argument, is terminated by the entry of a formal order to cease and desist or by other order terminating or closing the case. Such a proceeding is prosecuted in the name of the Commission by the chief counsel's division and testimony and evidence in such proceeding are proffered before a member of the trial examiner's division, who is charged with passing upon the testimony and evidence and with other details incident to the trial of the case.

Investigation in the preliminary stages is the function of the chief examiner's office.

Procedure and internal organization of the Commission, and methods of competition condemned by the Commission under section 5, are set forth in detail in its annual reports.

OTHER SECTIONS OF THE FEDERAL TRADE COMMISSION ACT

Under section 6, the Federal Trade Commission derives its authority for making general investigations. It is provided that the Commission shall have power to gather and compile information concerning, and to

investigate from time to time the organization, business conduct, practices, and management of any corporation engaged in commerce, excepting banks, and common carriers subject to the act to regulate commerce, and that it may require reports and answers to specific questions in the compilation of such information.

Under these powers, the Commission has conducted many economic inquiries, chiefly at the request of the President, the Senate, or the House, to whom reports have been made, and has gathered and published for the use of the Congress, the executive departments, and the public, a great deal of information regarding many of the essential industries of the country. The Commission also makes investigations on its own initiative under these powers, as in the instances of inquiries into the subjects of resale price maintenance and the price bases used by manufacturers and distributors quoting and selling articles and commodities.

The Commission also has power under section 6 to investigate alleged violations of the anti-trust acts by any corporation, upon the direction of the President or Congress, and, at the request of the Attorney General, to make such investigations and recommendations for changes in the corporation's methods so as to conform to the law.

Inquiries under way include those dealing with textiles, milk industry, price bases, and agricultural income.

The Commission is also empowered under section 6 to investigate the manner in which final decrees that have been entered in suits to restrain violations have been carried out, either upon its own initiative or at the request of the Attorney General, to whom it must report in the matter; to make such reports public; to investigate from time to time trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions may affect the foreign trade of the United States; and to make public from time to time such portions of the information obtained by it as it shall deem expedient in the public interest, except trade secrets and name of customers.

Section 7 of the Federal Trade Commission Act provides that in any suit in equity brought by or under the direction of the Attorney General as provided, in the anti-trust acts, the court may refer said suit to the Commission, as a master, in chancery, to ascertain and report an appropriate form of decree therein.

Other sections of the act give to the Commission authorization for such investigations and the compilation of data, with provisions for pro-

cedure under the act, and penalties prescribed for refusal of persons, partnerships, or corporations to furnish such material or to comply with orders of the commission to testify, produce evidence, or file reports, as required.

FUNCTIONS OF THE COMMISSION BOTH LEGAL AND ECONOMIC

It will be seen that under the Federal Trade Commission Act the functions of the Commission are both legal and economic. The legal functions include prevention of unfair competition and of violation of the Clayton Act. Investigatory functions include economic studies of domestic industry and interstate and foreign commerce.

TRADE PRACTICE CONFERENCES

The trade practice conference procedure, under the statutory authority of the Federal Trade Commission Act supposedly affords a means by which members of an industry may voluntarily agree and cooperate in establishing trade standards.

Such trade practice conference work of the Commission was instituted in 1919. By 1926 the Commission established what is now known as the Division of Trade Practice Conferences.

After termination of the National Recovery Administration codes, the President had, by Executive Order No. 7192, of September 26, 1935, delegated to the Commission all his authority under the National Industrial Recovery Act, as extended, to approve trade practice provisions of voluntary agreements under such act. This statute expired by limitation April 1, 1936. The course, however, remains open to industry under the Federal Trade Commission Act for voluntary cooperation and the Commission has actively "pushed" this branch of its work lately. This is the purpose of the trade practice conference procedure, of which a number of industries have thus far availed themselves.

The rules approved for industries who apply therefore under the trade practice conference procedure are stated to be designed to foster fair competition, to elevate the standards of business practices, and to safeguard the best interests of the ganeral public.

Rules established for an industry under the trade practice conference procedure are classified into two groups. In group 1 are placed all rules which prescribe practices that are illegal as constituting unfair methods

of competition or which otherwise offend against laws administered by the Commission. A greater part of the rules supposedly unsually fall into this group, and the Commission has jurisdiction to enforce them regardless of whether the offender has signed the agreement or otherwise agreed to abide thereby. In group II are placed rules relating to practices which are not illegal per se, but which the industry seeks. Compliance with group II rules is supposedly obtained mainly through agreement and voluntary cooperation among the industry members.

FALSE AND MISLEADING ADVERTISING CASES

The special board of investigation listed above was established for the purpose of effecting a more direct method of handling certain cases involving false and misleading advertising. Advertisers, publishers, broadcasting stations, and advertising agents in such cases have the privilege of dealing directly with the board with a view to reaching an agreement that will dispose of the issues involved and obviate the preparation and service of formal complaints.

Publishers, broadcasting stations, and advertising agents are accorded the privilege of being omitted from any formal proceedings by disclaiming any interest in the subject matter and agreeing by stipulation to abide by the provisions of any cease and desist order that may be issued against the advertiser or by the terms of any stipulation between the advertiser and the Commission.

FUNCTIONS OF THE COMMISSION UNDER THE EXPORT TRADE ACT (WEBB-POMERENE LAW)

The export trade act authorized the formation of associations entered into for the sole purpose of engaging in export trade, these associations to be exempt from the anti-trust laws of the United States, with the proviso that there shall be through the association no restraint of trade within the United States, or of the export trade of any domestic competitor, nor any artificial or intentional enhancing or depressing of prices, or substantial lessening of competition within the United States.

A Memorandum on the Robinson-Patman Act

It has been pointed out by several critics approaching the subject from various angles, that the Robinson-Patman Act as finally passed consists of two distinct pieces of legislation linked together by a common general purpose but differentiated in their origin, their methods, and their underlying philosophies. One consequence of this cleavage is bound to be a series of judicial difficulties. Both divisions are, however, equally the law of the land, and it will be necessary from the outset for the merchant to adjust his activities, so far as possible, to both, even in matters as to which they seem inconsistent.

Section 1 of the Act

Sect. 1 of the Act is based on an attempt to modify the old Sect. 2 of the Clayton Act which prohibited certain types of price discrimination under certain conditions.

Section 3 of the Act

Sect. 3 is a new bit of federal legislation that has nothing to do with the Clayton Act or with the Federal Trade Commission. It is simply a criminal statute prohibiting, in the ordinary way, the giving or accepting of price discriminations, or what amounts to an equivalent, in interstate commerce.

Thus Far No Difficulty

Certain differences might be expected between paragraphs of a statute dealing with the civil and the criminal liability of persons violating the general provisions of the statute or selected specific clauses. There is no difficulty arising out of the fact that the sanctions behind one provision are civil only, while those behind another provision are criminal, and a third provision subjects a violator to both civil and criminal penalties. It is furthermore to be expected that the method or degree of proof will differ in the two kinds of actions. Thus, in the case before us, very strong presumptions are indulged in against the person accused of discrimination on the civil side; whereas the ordinary burden of proving a case to the hilt falls on the prosecutor under the criminal law.

The Differences Between Sections 1 and 2

Difficulty arises, however, when we come to their varying treatments of particular substantive points. They differ radically in their treatment of the question of quantity discounts. Sect. 1 provides for a maximum beyond which further quantities are not to be considered. The criminal section says nothing about such a maximum.

A Question

Can a man be *prosecuted* for discriminating by means of a quantity discount calculated in spite of any finding by the Federal Trade Commission? It seems not, so long as he lays down a policy under which all buyers in the same quantity bracket are treated alike.

And Another

Again, in connection with the establishment of presumptions against the person accused in a civil action, there are certain provisions for the rebuttal of the *prima facie* case. Under the criminal law, there is no such presumption, and of course no need for rebuttal. Unfortunately, under the guise of rebuttal, certain affirmative offenses are inserted, and the question may fairly be asked whether these affirmative defenses in a civil action are available in a criminal action — particularly, whether it is a defense that one has cut a price to meet a specific legal competition. It would seem quite foolish to regard such action as a crime while civilly unobjectionable, yet that is precisely what the words of the statute say.

The Important Question of "Knowledge"

On the significance of the question whether the persons complained of, or other persons had "knowledge" of the alleged discrimination, one might expect differences between the criminal statute and the civil liability rule. There are some, but not exactly those that one might have expected. Obviously, it is reasonable to stipulate that the criminal statute applies only to those who had knowledge of the discrimination, and this is done. In the civil rule, nothing is said as to the knowledge of the seller, but a definite point is made of the knowledge of the buyer who induces or receives a discrimination. In fact, this knowledge of the buyer is curiously made a *sine qua non* of the liability of the seller where procedure is not on the basis of lessening competition or creating monopoly, but on the basis of injuring, destroying or preventing competition with one who receives the benefit of such discrimination or with his customers.

Importance of Word "Knowingly"

The use of the word "knowingly" in this last connection, with reference to the receiver of a benefit of the discrimination, goes far to destroy the additions to the old Section 2 of the Clayton Act. That Section, it will be remembered, stipulated, as an element in making discrimination unlawful, that the discrimination complained of must tend to create a monopoly or unduly interfere with competition. The novel principle is the substitution for this factor of the idea of injuring, destroying or preventing competition with certain persons. Of course the most important of the persons listed in this context is the recipient of the benefit, for it is his competitor who is normally hurt.

An Example

If the chain store, for example, buys its goods without any knowledge of or interest in the prices paid by competitors, apparently there is no offense, not only on their own part but on the part of the discriminating seller. And this, regardless of the existence of knowledge on his part which might make him liable criminally, if the words of the statute are logically applied.

Another Divergence

There is a great divergence, of language at least, between the civil provision of "proportionally equal terms" for all purchasers in connection with special services and facilities of the criminal law provision requiring the same treatment of all. It is possible, however, and reasonable, to interpret the criminal statute as referring to a rate rather than to a fixed amount of value in the comparison of transactions.

Still Another

There is a further difference between the two statutory provisions in that the criminal portion speaks only of discriminations against competitors of the purchaser, while the civil portion speaks of discriminations that tend to hurt competitors of the seller, the buyer, or the customers of either.

And, Finally This

Finally there is nothing in the part of the criminal statute which deals with discrimination that makes it necessary to prove either the social

damage of interference with competition or creation of monopoly or individual damage. Discrimination as such is declared illegal. Whether the statute means that or whether limitations are to be read into it by reason of its artificial insertion into the Clayton Act, remains to be seen.

The New Use of Section 2 of the Clayton Act

The original purpose of Sect. 2 of the Clayton Act had nothing to do with the buyer's conduct. The purpose was to prevent sellers from so manipulating prices that competition would be destroyed in one locality at a time. The new use of the Section for the purpose of curbing large buyers obviously resulted in a weakening of the original purpose of the Act. It can easily be contended that no competition exists between two merchants in widely separated localities on the basis of which the new kind of "discrimination" can be talked of. It is interesting to find this original purpose revived at the end of the criminal section. Whether it is still operative in the civil liability section is, to say the least, doubtful.

A Typical Question

Already, questions are being asked as to whether particular minor benefits allowed to customers peculiarly situated are improper discriminations. One question pertains to the acceptance of orders in smaller driblets from one customer than is the ordinary practice of a house. Of course this may be done for a consideration. According to the first part of the statute (civil), it need not be done even so for any but selected customers; according to the criminal part, it would have to be furnished for the same consideration to all — or none.

The Door Opened to An Abuse

This type of question opens the door to an abuse that was common in the early days of the N.R.A. — namely, the tightening of resistance to competition in the form of better attention or better service to customers on the plea that the statute forbids all countesies in the future. We may readily expect a tendency to impair the standard of service in business on this basis followed, as in the case of the N.R.A., by a bootlegging of the old courtesies which upon final analysis have little or nothing to do with the question of fair competition.

Other Questions

Other questions that come to the surface immediately have to do with the discovery that there are genuine transactions in business of the types of which the statute casts suspicion. What shall be done in the case of window display agreements which do not involve orders for goods? What shall be done where a genuine desire exists for manufacturer and distributor to cooperate in the advertising of a product that they are both interested in pushing? The answer of course will require a preliminary answer of the business question: How are the values of these services to be calculated so as to put the payment for them beyond all suspicion or question of their being subterfuges?

Interference With Liberty of Contract

Viewed as a whole, the purpose of the new legislation is to put buyers, large or small, weak or powerful, resourceful or helpless, on the same general bargaining plane. It is frankly a statute that interferes with liberty of contract. It does not extend to intrastate transactions except for comparisons to establish discriminations. It does not, in terms, operate to protect the small buyer as against the large; on the contrary, it gives the large buyer the right to complain if there is discrimination in favor of the small buyer. It enumerates certain details, which differ in the two parts of the Act, as to which discrimination is to be checked. Whether these details will operate so as to save the small dealer, and the machinery that goes with his salvation — namely, the broker, the wholesaler, certain credit practices and types of services furnished by the national distributor — will depend in a large measure on the practical administration of the Act.

No Guide On This Crucial Question

Unfortunately, however, for the practical administration of the Act there is no guide in it on a crucial question: How are we to figure costs, and, particularly, how are we to apportion the savings that come from particular methods of buying, to certain types of buyers or to a business for the whole group of buyers? The statute speaks very glibly about "due allowance for differences in the *cost* of manufacture, sale or delivery resulting from the different methods or quantities in which such com-

modities are to such persons sold or delivered." A large order given in a dull season with careful attention paid to the exact situation of a factory with reference to labor supply, materials, state or organization and physical equipment, may result in a very low cost per unit of product. How much of this lowering of cost is, in such a case, to be attributed to the methods of buying and the quantity factor, and how much is to be attributed to other factors and used as a basis for lowering the average cost per unit of the entire plant? It is submitted that accountancy has not yet reached a state in which these questions can be answered as clearly as the statute presupposes. Fortunately there is nothing in the criminal section of the act requiring such estimates. To make it workable in the civil portion will require either elucidating amendments or *strong-handed* administration to substitute a workable formula for a vague statutory theory that somehow or other the effect of a particular method or quantity can be definitely traced, by a quasi-mathematical process, into the cost of manufacture, sale or delivery. Without one of the two, it will be impossible to prove that any particular differential is a discrimination so long as business men take the simple precaution of making their transaction deviate ever so slightly from the standard form of sales agreement laid down in the Uniform Sales Act or the printed forms of a particular company.

NATHAN ISAACS
Professor of Business Law,
Harvard Graduate School of Business Administation.

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